85-253
NO.

Supreme Court, U.S.
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AUG 12 1985
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK MARINE MANAGERS, INC.
Petitioner

versus

HELENA MARINE SERVICE, et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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August, 1985

Of Counsel:

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

Question Presented for Review

Whether a court has the inherent power to compel appropriation into the Registry of the Court of the proceeds of a marine indemnity policy of insurance as to which there is no issue of policy interpretation or construction, simply because of the existence of unproved and unliquidated third-party claims which, if ever established, would be covered by or in excess of the policy of insurance.

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Eighth Circuit were:

Alpine Company
American General Fire and Casualty
Bellefonte Insurance Company
Consolidated Grain and Barge Company
Terry Deeks (stockholder)
Electro Coal Transfer Corporation
Employers Insurance of North America
Federal Insurance Company
Fidelity and Casualty of New York
Helena Fuel and Harbor
Helena Marine Service
Insurance Company of North America
Midland Insurance Company
Mid-South Towing
New York Marine Managers[1]
Northeastern Insurance Company
Northwestern National Bank of Minneapolis
Peavey Company
Pendleton Harbor Service
Pennsylvania Lumbermens Mutual Insurance
Ranger Insurance
Republic Insurance Company
Riceland Foods
River Equipment Company
Tampa Electric
Teco Transport and Trade Company
Underwriters at Lloyd's
Union National Bank of Little Rock
The United States of America
United States Fire Insurance

TABLE OF CONTENTS

Page

Question Presented for Review.....i
List of Parties.....ii
Table of Contents.....iii
Table of Authorities.....iv
Opinions Below.....1
Jurisdiction.....2
Statement of the Case.....3
Reasons Relied On for the Allowance of the Writ.....5
Conclusion.....8
Certificate of Service.....9
Appendix A.....A-1
Appendix B.....A-2
Appendix C.....A-12
Appendix D.....A-16
Appendix E.....A-19
Appendix F.....A-21
Appendix G.....A-23

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[1]Pursuant to Rule 28.1, New York Marine states that it has no subsidiaries. The following is a list of affiliates:

Lombard Pacific Insurance Services
Navigators Insurance
Texas Marine Underwriters Agency
Westcoast Marine Managers

TABLE OF AUTHORITIES

Page

CASES

Barnett v. Maryland Casualty Co.,
182 Ark. 496, 32 S.W. 2d. 310 (Ark. 1910).....6

Reliance Insurance Co. v. Kinman,
252 Ark. 1168, 483 S.W. 2d. 166 (Ark. 1972).....6

Southern Farm Bureau Casualty, Inc. Co. v. Robinson,
365 S.W. 2d 454 (Ark. 1963).....6

Taylor v. Federal Kemper Insurance Co.,
534 F.Supp. 196 (W.D. Ark. 1982).....6

OTHER AUTHORITIES

Ark. Stat. Ann. §66-4001 (Repl. 1980).....6
Fed. R. Civ. P.9(h)(1985).....4
28 U.S.C. §1254(1) (1982).....2
46 U.S.C. §181 (1982).....3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NEW YORK MARINE MANAGERS, INC.,
Petitioner

versus

HELENA MARINE SERVICE, et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinions below are contained in the appendices to the Petition for Certiorari. Appendix "A" is the denial by the Court of Appeals for the Eighth Circuit of Petitioner's Application for a Rehearing En Banc. Appendix "B" is the decision of the Court of Appeals for the Eighth Circuit filed on March 29, 1985. Appendix "C" is the order of the District Court of January 24, 1985. Appendix "D" is the Order of Remand of the Court of Appeals of December 20, 1984. Appendix "E" is the Order Granting Motion of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., for Further and Injunctive Relief dated November 26, 1984. Appendix "F" is the Judgment in favor of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., entered on July 13, 1984. Appendix "G" is a transcript of the oral Findings of Fact and Conclusions of Law given by the District Court on July 3, 1984.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1985, and the timely filed Petition for Rehearing En Banc was denied on May 13, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On December 4, 1982, due to catastrophic weather conditions, a number of barges were washed from their moorings at a fleet on the Arkansas River, allegedly damaging other barges, their cargoes, a wharf, and Dam No. 2. The United States Corps of Engineers asserted claims in excess of $6,000,000.00 and various private parties asserted claims totaling about $7,700,000.00.

Petitioner, New York Marine Managers, Inc., is the Marine umbrella or bumbershoot liability underwriter or insurer of Helena Marine Service, Inc. and of Pendleton Harbor Service, Inc. (Helena/Pendleton). The policy of petitioner insures Helena/Pendleton against alleged Marine Liabilities in respect of the fleeting facility and in respect of certain vessels owned or chartered by Helena/Pendleton. The limit of the policy of petitioner is five million dollars, excess of a policy of primary marine insurance in the amount of one million dollars, the total insurance of Helena/Pendleton in respect of this Casualty thus being only six million dollars.

Helena/Pendleton filed complaints in the United States District Court for the Eastern District of Arkansas for exoneration from or limitation of liability under 46 USC §181 *et seq* in respect of four tugs and ten barges allegedly involved in the breakaway. However, a significant segment of the claims, those of the United States Corps of Engineers, and those asserted by all third-party claimants against Helena/Pendleton as a fleeter (as distinguished from a vessel owner or charterer) are not subject to limitation of liability.

Helena/Pendleton called upon petitioner to agree to post in the limitation proceedings the required security for the value of the vessels in the amount of $2,401,000.00. Petitioner declined on the basis that the request was outside the terms of the policy contract; and moreover, that to do so would subject petitioner to liability above and beyond the policy limit because of the non-limitable claims.

To resolve the contention over the posting of security, a Declaratory Judgment Action was filed by petitioner in the United States District Court for the Eastern District of Arkansas, the basis of jurisdiction being the assertion of an admiralty or maritime claim under Rule 9(h) of the Federal Rules of Civil Procedure.

After a trial, the District Court held that petitioner was required to post the security. Petitioner then appealed to the Court of Appeals for the Eighth Circuit, which issued an Order of Remand on December 20, 1984. In the Order of Remand, the Court of Appeals directed that the District Court consider requiring petitioner to deposit into the Registry of the Court the proceeds remaining under the policy. Pursuant to the Order of Remand a hearing was conducted by the District Court; and on January 24, 1984, the District Court issued an order which amended the judgment and order of the District Court of July 13, 1984, and November 26, 1984, respectively, to relieve petitioner of any obligation to post security in the limitation of liability proceedings. However, the order of the District Court, following the suggestion of the Court of Appeals, also required petitioner to deposit the balance of the proceeds remaining under the policy.

Petitioner appealed that part of the order of the

District Court requiring the posting of the proceeds of the policy and Helena/Pendleton also appealed on that point. However, the Court of Appeals issued an opinion filed on March 29, 1985, affirming the order of the District Court requiring the posting of the policy proceeds. The issue of liability with respect to all third-party claims was then and continues to be contested, and there has been no proof of the amounts of the claims.

Petitioner and Helena/Pendleton filed Petitions for Rehearing En Banc which were denied.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The affirmance by the Court of Appeals of the District Court's order constitutes an arbitrary exercise of judicial power, and sets a dangerous precedent disruptive of established judicial policy with reference to the rights of both insureds and insurers under contracts of insurance. The action of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings and so far sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In requiring the deposit of the proceeds of a policy of marine indemnity insurance into the Registry of the Court without a determination of the issue of liability of petitioner's insureds or the ascertainment of the amounts of the claims asserted against the insureds, the Court of Appeals acted without precedent in recorded jurisprudence. There is no statute, rule, or reported decision of any court which supports such action.

The reliance by the Court of Appeals on the equity power of a court sitting in admiralty is misplaced. While equity has been used to fashion remedies to give effect to established rights, there is no authority or basis for creating a remedy where no right has been shown to exist. In the case at bar no right to the proceeds of the policy of petitioner has been established by any third-party claimant. To the contrary, the holding of the Court of Appeals emasculates established and sound judicial policy that an insurer can be divested of the proceeds of the policy only with reference to claims which have been the subject of judgment against the assured.

Further, the decision of the Court of Appeals contravenes the law of the State of Arkansas, which does not permit direct action against the underwriter prior to judgement. See Ark. Stat. Ann. §66-4001 (Repl. 1980). See, for example, *Taylor v. Federal Kemper Insurance Co.*, 365 S.W. 2d 454 (Ark. 1963);*Southern Farm Bureau Casualty, Inc. v. Robinson*, 365 S.W. 2d 454 (Ark. 1963). The decision of the Court of Appeals has effectively sanctioned a direct action against petitioner contrary to the explicit terms of the Arkansas statute.

The action of the Court of Appeals was not taken in resolution of any question of policy construction or interpretation; none is involved. Rather, the decision of the Court of Appeals simply disregards the contract between the parties. This result also undercuts established judicial policy that the terms of an insurance policy, like those of other contracts, should be given effect. *Barnett v. Maryland Casualty Co.*, 182 Ark. 496, 32 S.W. 2d. 310 (Ark. 1910); *Reliance Ins. Co. v. Kinman*, 252 Ark. 1168, 483 S.W. 2d 166 (Ark. 1972). The assureds, *Helena/Pendleton*, which appealed to the Court of Appeals

on this issue as well, assert that the posting of the remaining proceeds of the policy will seriously prejudice their ability to conduct their defense. In this regard, the provision of petitioner's policy providing for reimbursement to the insureds of "fees, charges and law costs" were arbitrarily written out of the contract.

Further, it is evident that the decision of the Court of Appeals sets a dangerous precedent which has far reaching implications. Henceforth, every insured and its insurer involved in a tort action will be placed in the position by a trial court relying on this decision of facing what amounts to confiscation of the insurance proceeds at the outset of a proceeding to the obvious detriment of both the insured and the insurer.

The decision of the Court of Appeals is alien to the jurisprudence and to sound reasoning because it makes the rights of an insured and its insurer established by the contract between them subservient to unproved and unliquidated claims of third-party claimants. The decision of the Court of Appeals shockingly departs from the accepted and usual course of judicial proceedings and cannot be permitted to stand.

CONCLUSION

For the reasons stated in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

OF COUNSEL:

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10th day of August, 1985, served a copy of the foregoing document on counsel for all parties to this proceeding by delivering same by hand or by overnight courier properly addressed.

J. BARBEE WINSTON

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1927/85-1195/1196/ 1229/1230-EA. September Term, 1984

NEW YORK MARINE MANAGERS, INC.,

Appellant,

VS.

HELENA MARINE SERVICE INC., AND PENDLETON HARBOR SERVICE, INC.,

Appellees.

Appeals from the United States District Court for the Eastern District of Arkansas

Petitions for rehearing en banc filed by New York Marine Managers, Inc., Helena Marine Service, Inc., and Pendleton Harbor Service, Inc. have been considered by the Court and are denied.

The petitions for rehearing by the panel are also denied.

May 13, 1985

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1927

New York Marine Managers, Inc.,
Appellant,

v.

Helena Marine Service, et al,
Appellees.

No. 85-1195

Teco Transport, et al,
Appellees,

v.

New York Marine Managers,
Appellant.

No. 85-1196

Teco Transport, et al,
Appellees,

v.

Pendleton Harbor, et al,
Appellants.

No. 85-1229

Pendleton Harbor, et al,
Appellees,

v.

Consolidated Grain & Federal Ins.,
Appellant.

No. 85-1230

Teco Transport, et al,
Appellants,

v.

Pendleton Harbor, et al,
Appellees.

No. 85-1235

Pendleton Harbor, et al,
Appellees,

v.

Peavey, et al,
Appellants.

Submitted: March 11, 1985
Filed:March 29, 1985

Appeals from the United States District Court for the Eastern District of Arkansas.

Before HEANEY, ROSS, and FAGG, Circuit Judges.

PER CURIAM.

These related appeals and cross-appeals arise from an order of the district court[1] entered on January 24, 1985, following proceedings which were conducted pursuant to a remand order of this court, *New York Marine Managers, Inc. v. Helena Marine Service, Inc., and Pendleton Harbor Service, Inc.* No. 84-1927 (8th Cir. Dec. 20, 1984). We affirm the district court order and remand only to direct the district court to lift the stay of its November 19, 1984 order and to amend its January 24, 1985 order to conform to the language set forth on page 9 of this opinion.

I. BACKGROUND

On December 4, 1982, a number of barges owned, operated or chartered by Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. (Helena/Pendleton) were washed away from their moorings on the Arkansas River during a storm. The barges were swept down river and allegedly damaged other barges and cargoes, a wharf and a dam. Damages are alleged to amount to approximately $12,000,000. Helena/Pendleton has a primary insurance policy in the amount of $1,000,000, and an excess insurance policy, issued by New York Marine Managers, Inc. (New York Marine). as agent for various underwriters, in the amount of $5,000,000.

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[1]The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

On June 3, 1983, Helena/Pendleton and other limitation petitioners filed five actions pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 181-195, in the district court for exoneration from or limitation of liability in connection with the vessels allegedly involved in the breakaway. Helena/Pendleton filed *ad interim* stipulations for value purporting to assign the proceeds of the excess policy as Supplemental Admiralty Rule F security. Claimants filed motions to dismiss the limitations proceedings based upon the inadequacy of the stipulations as Rule F security.

During the pendency of the motions to dismiss in the limitation proceedings, New York Marine filed a separate action, which was assigned to a different judge, seeking a declaration that it had no obligation to post security in the limitation proceedings. Helena/Pendleton counterclaimed for a reverse declaration, and on July 3, 1984, the declaratory judgment action was tried before Judge Overton. Claimants were not given notice of the declaratory judgment action and were not present during that proceeding. Judge Overton entered judgment on July 13, 1984, in favor of Helena/Pendleton. On July 23, 1984, New York Marine filed a notice of appeal.

During the pendency of the appeal, Judge Howard, who was presiding over the limitation proceedings, entered an order on November 19, 1984, requiring Limitation Petitioners to establish limitation funds in the form of unconditional corporate surety bonds in the amount of $3,401,000, plus interest. Judge Overton, who presided over the declaratory judgment action, then ordered New York Marine to post the surety bond on behalf of its insureds, Helena/Pendleton. The November 19, 1984 order was then stayed pending the outcome of the appeal of the declaratory judgment action.

Following oral argument, this court entered an order on December 20, 1984, remanding the declaratory judgment action to the district court for further proceeding. The declaratory judgment action was consolidated with the limitation actions and assigned to Judge Howard. Judge Howard, pursuant to the remand order, conducted a hearing at which claimants for the first time presented their views on the issues raised in the declaratory judgment action. Following the remand hearing, Judge Howard entered an order relieving New York Marine of the obligation to post security in the limitation proceedings but requiring New York Marine to deposit in the registry of the court the bumbershoot policy proceeds minus any disbursements already made. These appeals and cross-appeals followed.

II. *DISCUSSION*

The only issues now before the court are: 1) whether New York Marine is required to post the security in the limitation actions; 2) if they are not, whether they are required to deposit the policy proceeds in the registry of the court; and 3) whether the Limitation Petitioners are required to post the security.

New York Marine argues that it is improper to require it to post security in the limitation proceedings because no provision of the policy or custom in the marine insurance industry requires it to post security when the result is to expose New York Marine to a potential risk of exposure beyond its policy limits. While Helena/Pendleton concedes that no express provision in the policy requires New York Marine to post security, they maintain that the duty may be implied from Condition D of the policy and the custom and practice in the industry.

Having read the policy and having considered the evidence of industry practice, we find that we are persuaded by New York Marine's arguments, especially in light of the position of the claimants.

It is the opinion of this court that Condition D which states in part that the "* * * Underwriters shall cooperate in all things in the defense of such claim, suit or proceeding" is insufficient to impose an obligation on New York Marine to post security absent a specific custom in the industsry to do so. We think, that under the circumstances of this case, such an implied duty may only be imposed based upon a custom and practice that is certain, uniform, definite and known to both parties. *See, e.g., Peoples Protective Life Insurance Co. v. Smith*, 514 S.W.2d 400, 405 (Ark. 1974).

We have carefully considered the evidence of the industry practice presented in the declaratory judgment action. Although there was evidence that generally marine insurance underwriters assist their insureds in providing security, there was no specific evidence that underwriters post security, absent and express agreement, when it exposes them to a possible extension of the policy limits. In fact, when pressed on this point, no witness had ever encountered the situation presented by this case. Hence the evidence of custom lacks certainty and specificity and cannot provide an adquate basis for the imposition of an implied duty upon New York Marine to post security in the limitation proceedings.

By posting the Rule F security New York Marine could be subjected to a risk of liability beyond the policy limits if nonlimitation claimants filed actions outside the limitation proceedings and succeeded in arguing that the

posting, by the bumbershoot underwriters, of the Rule F security did not deplete the policy proceeds. We think this risk is more than hypothetical, especially in light of the position taken below by the United States, the primary nonlimitation claimant. However, it is not only our concern for New York Marine's exposure that leads us to our conclusion. Because this is an equitable proceeding the court must also consider the rights of all claimants in addition to considering the rights of the insureds and the insurors. To require New York Marine to post security in the limitation proceedings under the circumstances of this case may create a priority in favor of those claimants with limitable claims over claimants with nonlimitable claims. It is the view of the court that such a result is not desirable or proper at this stage of these proceedings.

We therefore hold that New York Marine is not required to post security for Helena/Pendleton in the limitation proceedings because there is no express provision in the policy, or any certain and specific evidence of custom within the marine insurance industry requiring an underwriter to post security in limitation actions and risk exposure beyond the policy limits in related nonlimitation actions and because equity requires us to protect all parties at this stage of the proceedings.

We next consider whether New York Marine must deposit the policy proceeds minus its disbursements in the registry of the district court. New York Marine objects to such a requirement and contends that requiring it to deposit the policy proceeds before any judgment is entered in the limitation proceedings is without authority or precedent. We find that requiring New York Marine to deposit the policy proceeds is within the equitable powers of the district court sitting in admiralty and not an abuse

of discretion under the circumstances of this case. "A limitation proceeding is 'the administration of equity in an admiralty court' and 'all the ease with which rights can be adjusted in equity is intended to be given to the proceeding.' " *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 597 (2d Cir. 1961). *cert. denied*, 368 U.S. 989 (1962) (citations omitted). As for the amount to be deposited, this court adheres to its earlier suggestion that the amount to be deposited by New York Marine should be the limit of the policy minus the disbursements already paid as of the date of this opinion. The court makes no determination at this time as to any question relating to attorney fees and who pays them. Specifically, we do not decide whether they are deductible from the limits of either the primary or bumbershoot policies or whether they are in addition to the policy limits in one or both policies. Although we affirm the requirement to deposit the bumbershoot policy limits less prior disbursements, it may later be determined that the bumbershoot underwriters or the primary underwriters are liable for the policy limits plus attorney fees.

Lastly, we turn to the ruling implicit in the January 24, 1985 order of the district court, namely that the Limitation Petitioners will be required to post a corporate surety bond as Supplemental Admiralty Rule F security. The procedure by which a shipowner can limit its liability is governed by 46 U.S.C. §185 and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. FED. R. CIV. P. Supplemental Rule F. A vessel owner, seeking the benefits of the Limitation of Liability Act must deposit with the court, for the benefit of claimants, "a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor * * *." Supplemental Rule F(1). Proper security may be posted

through 1) physical surrender of the vessel and pending freight to a trustee, 2) a deposit with the court of cash equal to the value of the owner's interest in the vessel and pending freight, or 3) approved security. *Matter of Compania Naviera Marasia S.A.*, 466 F. Supp. 900, 901 (S.D.N.Y. 1979). The posting of proper and adequate security is a condition precedent to obtaining the benefits of the Limitation Act, *id.*, and the district court is well within its discretion to require the Limitation Petitioners to post security in one of the approved forms. We hold that the Limitation Petitioners must deposit cash or post a corporate surety bond in the amount or value of their interest in the vessels or surrender the requisite vessels in order to continue to benefit by the provisions of the limitation of liability statute.

In light of the above, we affirm the January 24, 1985 order of the district court and remand only with directions to lift the stay of its November 19, 1984 order requiring the Limitation Petitioners to post the security and to amend the January 24, 1985 order to include the following language:

The court makes no final determination of several questions which will be held in abeyance until after all claims are decided by this court. These include, but are not limited to:

a) any question relating to the priority of claimants to the insurance proceeds, including priorities as between limitation claimants and nonlimitation claimants and priorities within each of these classes of claimants; and
b) any question relating to attorney fees and who pays them. Specifically left open is whether fees are deductible from the limits of either the primary or bumbershoot policies, whether fees are in addition to the policy limits in

one or both policies, and whether the bumbershoot underwriters or the primary underwriters are liable for the policy limits plus attorney fees.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

FILED JAN. 24, 1985

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

NEW YORK MARINE MANAGERS, INC.
PLAINTIFF

v.

HELENA MARINE SERVICE, INC. and
PENDLETON HARBOR SERVICE, INC.
DEFENDANTS

No. PB-C-84-90, Consolidated With
PB-C-83-197,198,199,200
and 201

ORDER

On January 11, 1985, this Court of Appeals conducted a hearing, as directed by the Court of Appeals for the Eighth Circuit in its order of December 20, 1984, in order to permit claimants, limitable and nonlimitable, to express their views on the question whether the order entered on November 26, 1984, in Civil Action PB-C-84-90, now consolidated with these proceedings, requiring New York Marine Managers, Inc., underwriter of insurance coverage covering Helena Marine Services, Inc., and Pendleton Harbor Service, Inc. to:

> [P]ost good and sufficient surety bond in the amount of $2,401,000.00 plus interest on $3,401,000.00 at the rate of 6% from June 6, 1983 on behalf of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. in the limitation

> of liability actions pending on the docket of this court as Civil Action Nos. PB-C-83-197 through 201 within the time period such bond is required to be posted under the order of The Honorable Judge Howard entered in such actions on November 19, 1984, including extensions of time granted therein by the Court, and that plaintiff, New York Marine Managers, Inc. maintain such security in the limitation of liability proceedings as long as required by the Court.
>
> [I] n the event additional security is required by the Court in aforementioned limitation of liability actions, plaintiff will post and maintain such additional security on behalf of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. within the time periods ordered by the Court, provided that the total of all security posted by New York Marine Managers, Inc. shall not exceed that limit of coverage provided in the bumbershoot insurance policy issue by New York Marine Managers, Inc.

has the potential of subjecting the underwriter to the risk of extension of the bumbershoot policy limit of $5,000,000.00.

All claimants, including New York Marine Managers, Inc., were invited to file pleadings setting forth their views and each participant was afforded the oppor-

tunity to present oral argument. After carefully considering the views expressed by all concerned and the Court of Appeals' order, the Court makes the following findings:

1. While the judgment and order of the Court, the Honorable William R. Overton, of July 13, 1984, and November 26, 1984, respectively, in Civil Action No. PB-C-84-90, were not intended to extend the liability of the bumbershoot underwriter beyond its obligation of $5,000,000.00, as specified under the policy, this Court is persuaded that it is arguable that there is the potential of such extension in view of the fact that the underwriter, under said judgment and order, is required to post security in the limitation of liability proceeding. The universal rule appears to be that insurance proceeds under an owner's contract for insurance may not be taken into consideration in determining the extent of the limitation of liability fund. *Place & Others v. Norwich & New York Transportation Company*, 118 U.S. 468 (1885), 30 L. Ed. 134, 6 S. Ct. 1150. It is undisputed that the limitation fund is to represent the value of the owner's interest in the vessel and pending freight, or approved security therefor. In the instant case, there is no provision in the bumbershoot policy requiring the underwriter to post security in behalf of the owners in the limitation proceedings. Hence, this Court finds that there is a likelihood that the underwriter's liability has the potential of being extended beyond the policy limits of $5,000,000.00.

Therefore, the judgment and order of July 13, 1984, and November 26, 1984, are amended to relieve the underwriter of any obligation to post security in the limitation of liability proceedings.

2. Further, this Court is persuaded that the underwriter should be required to deposit immediately, in the registry of the Court, the $5,000,000.00 policy limit, as reflected in the bumbershoot policy coverage, minus whatever disbursements the underwriter has made from such coverage to the owners or in their behalf in these proceedings. To reiterate, once this sum has been deposited, the underwriter's liability as to both limitable and nonlimitable claimants shall not extend beyond the amount deposited.

The Clerk of the Court is authorized to invest these proceeds in United States Treasury Bills or, at his discretion,other approved investment programs for a period of six (6) months. At the end of said six months, if these proceedings and other possible related proceedings, requiring the disbursement of said funds have not been terminated, the Clerk is authorized to invest these proceeds for such additional period of time as may be necessary and proper.

IT IS SO ORDERED this 24th day of January, 1985.

/s/ George Howard, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1927

New York Marine Managers, Inc.,
Appellant,

v

Appeal from the United States District Court for the Eastern District of Arkansas.

Helena Marine Service, Inc. and Pendleton Harbor Service, Inc.,
Appellees.

Submitted: November 20, 1984

Filed: December 20, 1984

ORDER

New York Marine Managers, Inc., (New York Marine) appeals the district court's entry of declaratory judgment ordering it to post security for its insureds, Helena Marine Service, Inc., and Pendleton Harbor Service, Inc., (Helena/Pendleton) in five limitation of liability actions currently pending in the Eastern District of Arkansas.

After hearing oral argument, and after careful review of the briefs and record, this Court is troubled by New York Marine's principal argument that the district court's order may have the potential of subjecting the underwriters to the risk of extension of the bumbershoot policy limit of $5,000,000.00. The claimants who have non-limitable claims, presently including four private party claimants and the United States Government, may assert rights to the proceeds of the bumbershoot policy adverse to those of the limitation claimants. However, those claimants are not parties to this action, and their views have not been heard. While this Court is of the present view it has the authority to enter an order resolving New York Marine's concerns, it deems it advisable to give all parties interested in these proceedings an opportunity to be heard.

In view of these considerations, we remand this case to the district court for further proceedings, with the following directions:

1. This declaratory judgment action, Civil Action No. PB-C-84-90, shall be consolidated with the limitation of liability actions currently pending in the Eastern District of Arkansas: PB-C-83-197, PB-C-83-198, PB-C-83-199, PB-C-83-200, and PB-C-83-201. The district court shall determine to which judge the consolidated actions will be assigned.

2. The district court shall hold an expedited hearing, in which all claimants, including claimants with limitaable claims and claimants with non-limitable claims, are directed to participate and express their views on the issues raised in this matter. At the conclusion of the hearing, the district court shall determine whether the order that the bumbershoot underwriters post security in the limitation actions subjects them to an extension of their

liability beyond the policy limits. If it determines this question in the affirmative, it shall enter an amended order eliminating the danger to the bumbershoot underwriters.

3. In reaching its decision the district court shall consider the advisability of requiring the bumbershoot underwriters to post the entire amount of the proceeds then available under the policy ($5,000,000 less whatever amounts have already been paid under the policy) with the proviso that the bumbershoot underwriters' liability as to both limitable and non-limitable claims may not extend beyond the amount posted.

We retain jurisdiction of this matter pending the proceedings on remand. Upon entry of the district court's order, the parties may seek an expedited review of the order in this Court. Pending further review by this Court, the district court shall take whatever steps are necessary to maintain the status quo.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Filed Nov. 26, 1984

NEW YORK MARINE MANAGERS, INC.

VS. No. PB-C-84-90

HELENA MARINE SERVICE, INC.,and
PENDLETON HARBOR SERVICE, INC.

ORDER GRANTING MOTION OF HELENA MARINE SERVICE, INC. AND PENDLETON HARBOR SERVICE, INC. FOR FURTHER AND INJUNCTIVE RELIEF PURSUANT TO 28 U.S.C. §2202

Considering the pleadings and evidence, and the parties having waived hearing on the motion of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. for further and injunctive relief pursuant to 28 U.S.C. §2202 and the memorandum in opposition thereto;

IT IS HEREBY ORDERED that the motion of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. for further and injunctive relief be, and hereby is granted;

IT IS HEREBY FURTHER ORDERED that plaintiff, New York Marine Managers, Inc. post good and sufficient surety bond in the amount of $2,401,000.00 plus in-

terest on $3,401,000.00 at the rate of 6% from June 6, 1983 on behalf of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. in the limitation of liability actions pending on the docket of this Court as Civil Action Nos. PB-C-83-197 through 201 within the time period such bond is required to be posted under the order of The Honorable Judge Howard entered in such actions on November 19, 1984, including any extensions of time granted therein by the Court, and that plaintiff, New York Marine Managers, Inc., maintain such security in the limitation of liability proceedings as long as required by the Court.

IT IS HEREBY FURTHER ORDERED that in the event additional security is required by the Court in the aforementioned limitation of liability actions, plaintiff will post and maintain such additional security on behalf of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. within the time periods ordered by the Court, provided that the total of all security posted by New York Marine Managers, Inc. shall not exceed the limit of coverage provided in the bumbershoot insurance policy issued by New York Marine Managers, Inc.

Signed this 26th day of November, 1984.

/s/ William R. Overton

UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTSRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Filed July 13, 1984

NEW YORK MARINE MANAGERS, INC.

VS. No. PB-C-84-90

HELENA MARINE SERVICE, INC., and
PENDLETON HARBOR SERVICE, INC.

JUDGMENT

This action seeking a declaration of the rights and obligations of the parties pursuant to Policy No. A&P/H-8777 issued by New York Marine Managers, Inc., having come on for trial on the merits on a former day, with the issue of all damages having been bifurcated, and the Court having considered the evidence adduced, the applicable law and the stipulations of the parties, rendered its oral Findings of Fact and Conclusions of Law on July 3, 1984;

Considering the foregoing and the reasons stated in the Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., and against plaintiff, New York Marine Managers, Inc., denying the complaint and request by New York

Marine Managers, Inc. that it be declared to have no responsibility to defendants under the said policy of insurance to provide surety for the *ad interim* stipulations and/or security as demanded by defendants, and granting the counter-claim of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. for a declaration that New York Marine Managers, Inc. is fully obligated to post and maintain adequate and proper *ad interim* stipulations and/or security as required in the limitation of liability actions filed by Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., bearing Civil Action No. PB-C-83-197, PB-C-198, PB-C-199, PB-C-200, and PB-C-201 on the docket of the United States District Court for the Eastern District of Arkansas;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aggregate amount of the *ad interim* stipulations or other security shall not exceed the amount of the proceeds remaining under the said insurance policy at the time the *ad interim* stipulations are given or other security posted;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint against Helena Marine Service, Inc. and Pendleton Harbor Service, Inc. be dismissed with prejudice at plaintiff's cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court be assessed against New York Marine Managers, Inc.

Judgment rendered and entered in Little Rock, Arkansas, this 11th day of July, 1984.

/s/ William R. Overton

UNITED STATES DISTRICT JUDGE

APPENDIX "G"

Oral Findings of Fact and Conclusions of Law by District Court on July 3, 1984 (excerpted pages from transcript)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

NEW YORK MARINE MANAGERS, INC.
Plaintiff

VS.

HELENA MARINE SERVICE, INC., and
PENDLETON HARBOR SERVICE, INC.
Defendants

No. PB-C-84-90 Little Rock, Arkansas
July 3, 1984 - 10:05 a.m.

BEFORE THE HONORABLE WILLIAM R. OVERTON, UNITED STATES DISTRICT JUDGE, as follows:

APPEARANCES:

On behalf of the Plaintiff:

J. BARBEE WINSTON
EDWARD F. LEBRETON, III
1300 Hibernia Bank Building
New Orleans, Louisiana 70112

MR. WILLIAM L. OWEN
Superior Federal Building
Little Rock, Arkansas 72201

On behalf of the Defendants:

CHARLES M. STEEN
One Shell Square-50th Floor
New Orleans, Louisiana 70139

BEVERLY ROWLETT
One Spring Street
Little Rock, Arkansas 72201

THE COURT: With respect to any findings of fact, I think the record is probably complete on the Motion for Summary Judgment and the Stipulations which were entered into by the parties.

The Motion for Summary Judgment can be entered in favor of the defendant and against the plaintiff just on the undisputed facts in the record and the stipulations.

There is one fact finding which I would make which would be in supplement to that record, and that is that the defendants ,Helena Marine and Pendleton Harbor, do not have the money to collateralize the security in order to pursue a limitation action. In other words, they do not have the two point four million dollars which is necessary to collateralize that security.

There was a good bit of evidence, both in the form of oral testimony and by way of deposition, introduced which was the subject of objections by the parties. I let that evidence in over the objections of the parties and said that in the event it is used as part of the evidence to support the findings of conclusions of law, I would make a note that the objections were made.

I do not use that testimony as support for any of the conclusions of law which I have reached. Just so the record will be complete, I make as findings of fact from the evidence admitted over the objections that the bumper-shoot policy, which is much like an umbrella policy, was purchased by the insured in this case with the

understanding that coverage would be provided without qualification. It was contemplated by the insured that in the event there was a loss, that the security would be posted; that limitation action could be pursued and the insured would continue to operate and do business without having to interrupt the insured's operation.

I find it is the practice, policy, understanding of the insured, the brokers and the underwriters in marine policies such as these, and in particular, this bumbershoot policy which is a fairly common policy to the industry, that in the event security is needed, that it is treated as an expense of litigation and is provided by the underwriters, and that as a part of that providing of security in limitation actions, the insureds are not called upon to first incur the expense of providing the security bonds, if that is the way the security is provided, and then to be reimbursed by the underwriters but that the underwriters incur that expense initially.

Pursuant to this understanding and practice of the industry and with reference to this particular case, ordinarily in the usual course of events the bumbershoot underwriter, New York Marine Managers, would provide security for the limitation action, which is the subject of this case, and it was the reasonable expectation of the insured that the security would be provided and that the limitation action is an action normally contemplated by this type of marine insurance and one that is common to the industry.

Those are the finds of fact which I would make over and above the Stipulation of Fact.

As I said, again, before I made those findings, I don't think those findings are essential to any of the legal conclusions but I certainly think those findings are consistent with the legal conclusions.

With respect to the conclusions of law, the policy provides in the ultimate net loss definition, of course, that with respect to the amounts the assured becomes obligated to pay that includes or shall include all sums, including among other things 'fees, charges, law costs, premiums on attachment or appeal bonds, expenses for litigation of claims and suits which are paid as a consequence of any occurance covered hereunder.'

Well. I don't think there is any dispute that this litigation which is part of the limitation action in the claims of the United States Government and the various claims by parties which are reflected in the Stipulation of Fact are losses which are covered under this bumbershoot policy.

With respect to the fact that posting security for a limitation action is not expressly mentioned in the policy, I don't think that omission of an express mention of coverage or the providing of security in the limitation action is particularly relevant.

Of course, the policy was written with the law in mind and the law clearly provides a limitation action, and a limitation action is certainly contemplated by the law and that a limitation action is a natural consequence of catastrophic losses such as the one which occurred in this case.

Certainly, the providing of security is an expense or cost of that litigation. Furthermore, in this case it is

undisputed that the initiation of the limitation action is in the best interest of the insured and that sort of action is certainly one that is contemplated when the policy is written.

So, even though the expressed language of the policy might not impose a duty upon the underwriter to provide security in a limitation, certainly that policy language and the policy coverages, I think, contemplate that they will do what is provided in the law and a limitation action requires that sort of security.

I think it is the clear intent of the policy that security be provided for a limitation action.

With respect to the contention that the policy is---or the obligation of the underwriter only comes into play after the insured incurs the expense of providing security, I would say that that language of the policy reads in that fashion. I mean, certainly it is consistent with that argument because the language of the ultimate net loss provision talks in terms of expenses which are paid as a consequence, and, of course, the relevant words are, quote, are paid, end quote.

That would suggest that it is a policy which contemplates indemnity for loss as opposed for indemnity for liability. I don't think that particular language can stand much scrutiny in that area. I think the policy is a policy of indemnity for liability as opposed to indemnity for loss. Certainly, despite that language, I don't think it could be reasonably argued that the insured in this case should have to liquidate the company to incur or to come up with enough money to provide security and then seek reimbursement for that expense after liquidation.

It would be an impossible financial obligation on the insured in this case to require them to liquidate and to pay these substantial amounts involved in the suits. It, of course, would require these insureds to hypothecate all their assets, and then it is of little value to the insured at that point to have the underwriter provide security because the business is put to an end.

Obviously, the policy contemplates that it is insuring these two companies for indemnity for liability and not for loss. It was never contemplated by the policy that the insured would have to, in effect, go out of business in order to take advantage of a limitation action such as this one.

So, I don't think the policy language could reasonably be interpreted to require liquidation of these defendants in order to post security to pursue the limnitation action.

Apparently, I gather from the deposition of Mr. Ogden that that has never been the way this language has been interpreted or applied in other cases.

With respect to the claim that the underwriters shouldn't have to post security because it would expose them to liability in excess of the policy limits, I think that argument is speculative at best. All these claims are consolidated, both the limitable claims and the non-limitable claims. It is difficult to foresee how the non-limitable claims could be reduced to judgment before the limitable claims so that it would work an excess policy situation on the underwriters.

Secondly, it occurs to me that any reasonable interpretation of the law would require a court to reduce the

policy limits by the amount of security posted. And even if the Goverment in some way did reduce the claims to judgment while security was posted and before the limitable claims were reduced to judgment, I can't imagine how any court would say that posted security couldn't be used to reduce the policy limits.

In any event, I don't think that this Court can interpret a policy limits when there is not a loss in existence which puts those policy limits in jeopardy---In other words, a double-dipping of the policy so that there is any realistic possibility that losses will exceed the policy limits for which the underwriter would become liable. I just don't think that excess liability would ever come to pass.

In any event, I suppose the final answer to that claim that there is the exposure to excess liability is that this policy was written by the underwriter. If that potential existed, the underwriter could have guarded against it in the policy language and the insuring agreement and that if they failed to do that, that is nobody's fault but their own.

So, I don't think that can be used as a defense to escape the obligation to post security.

Mr. Winston, is there any factual dispute or area of factual dispute that you think I have left unresolved that would be important to you on appeal of this case if you decide to appeal it?

MR. WINSTON: If I may have a minute to confer?

THE COURT: Okay, sir. If there is any question of either factual or legal dispute---

MR. WINSTON: Judge, we can't think of anything.

THE COURT: Is there any area of legal dispute I have failed to address which you think would be important to you on appeal if you decide to appeal?

MR. WINSTON: Your Honor, I think you have dealt with the areas.

THE COURT: Well, I just didn't want you to get up on appeal and for there to be some unresolved issue that would be important to you.

Mr. Steen, what about you, sir?

MR STEEN: No, sir. I believe that covers it.

THE COURT: I would suggest that you all get together and talk about the form of the actual judgment itself. Perhaps you could agree to some form.

Mr. Winston, I am not expecting you to agree with my findings or to be bound in any way. Anything you come up with in the way of a judgment that reflects the findings will be fine with me. By doing that, you are not waiving any rights to appeal as far as I am concerned, but I would prefer it if you all could come up with an agreed form of judgment that we could enter that would reflect these findings. Do you anticipate any problem with that?

MR. STEEN: I anticipate no problem. I suggest I prepare a draft and submit it to Mr. Lebreton and Mr. Winston, and we shouldn't have any problem.

THE COURT: All right. About the penalty and attorney fee situation, we have in Arkansas sort of a unique rule about that. In order to recover penalty and attorney fee you must actually recover the exact amount for which you sued. I don't know if your counterclaim, Mr. Steen, where you seek damages in excess of that affects your penalty and attorney fee claim or not. I just don't know, but under the case law, for example, if you sue for $9,500.00

and you recover $9,450.00 you do not get penalty and attorney fees. You have to recover everything you seek.

Of course, in this case you are seeking damages in addition to the declaratory judgment which, just off the top of my head, I would think would affect your claim for penalty and attorney fee. That is something you all can look at. If you satisfy yourselves that there is a claim for penalty and attorney fee, I am sure you all could probably work out some appropriate figures for that.

If you can't why don't you just leave that part out of the declaratory judgment and I will decide that as a separate legal issue.

MR. STEEN: I think that is what we have envisioned with our motion to bifurcate, that that would not hinder the entry of the judgment on the merits or the findings and conclusions, and would hold out the attorney fees and penalties, if any, to a later date.

THE COURT: Well, whatever you all want to do. You might want to brief that separately. If you can't agree on that, just let me know.

I would like to get this judgment in by next week, though, if we could. Would you try to get something to Mr. Winston this week before the week is out?

MR. STEEN: I assure you it is in our mutual best interests to finalize the matter.

THE COURT: Gentlemen, enjoyed seeing you. Court will be in recess.

(Court recessed at 2:30 p.m.)

CERTIFICATE

I, Sandra Smith, CVR, Official Court Reporter for the Eastern District of Arkansas, certify that the foregoing pages constitute an accurate transcription of the proceedings in the above-entitled cause.

WITNESS MY HAND this 9th day of August, 1984.

/s/

SANDRA SMITH, CVR